

**Marsh (Migration) [2020] AATA 3282 (25 June 2020)**

**DECISION RECORD**

|                                   |                                                                                                                                         |
|-----------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                                                            |
| <b>APPLICANT:</b>                 | Mr Dominic Marsh                                                                                                                        |
| <b>CASE NUMBER:</b>               | 2002501                                                                                                                                 |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2019/5206950                                                                                                                         |
| <b>MEMBER:</b>                    | Vanessa Plain                                                                                                                           |
| <b>DATE:</b>                      | 25 June 2020                                                                                                                            |
| <b>PLACE OF DECISION:</b>         | Melbourne                                                                                                                               |
| <b>DECISION:</b>                  | The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 500 (Student) visa. |

Statement made on 25 June 2020 at 10:44am

**CATCHWORDS**

*MIGRATION – Cancellation – Student (Temporary) (Class TU) visa – Subclass 500 visa – applicant was no longer in a relationship with primary applicant – minor child from the relationship - mental and emotional well being of the applicant's minor child – decision under review set aside*

**LEGISLATION**

*Migration Act 1958, ss 5F, 116  
Migration Regulations 1994 (Cth), r 1.12*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 7 February 2020 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that a circumstance which permitted the grant of the visa no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 23 June 2020 to give evidence and present arguments.
4. The applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

### CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the grounds set out in s.116(1)(a) of the Act. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

#### Does the ground for cancellation exist?

##### Ground for cancellation

The ground for cancellation considered in by the delegate was as follows:

##### ***Section 116 - Power to cancel***

- (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
  - (a) *The decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists;*
- (2) The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.
- (3) If the Minister may cancel a visa under subsection (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

7. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.

8. **Particulars of the ground for cancellation**

9. Information before the Department appeared to indicate that the applicant was no longer in a relationship with Maria Juanita Barboza. The applicant's visa was granted because the application met, among other criteria, the secondary criteria for the visa on the basis that the applicant was a member of the family unit of Maria Juanita Barboza, as prescribed by paragraph (2)(a) of regulation 1.12 of the *Migration Regulations 1994* (the Regulations), which provides as follows:

- (2) *A person is a member of the family unit of another person (the family head) if the person:*  
(a) *is a spouse or de facto partner of the family head; or*

To be a member of the family unit of Maria Juanita Barboza as prescribed by reg 1.12(2)(a), the applicant needed to continue to be either a spouse or de-facto partner of that person as defined respectively by sections 5F and 5CB of the Act, which state (in part):

**s5F 'Spouse'**

- (1) *For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a married relationship if:*
- (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
  - (b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*
  - (c) *the relationship between them is genuine and continuing; and*
  - (d) *they:*
    - (i) *live together; or*
    - (ii) *do not live separately and apart on a permanent basis. 1...]*

**s5CB 'De facto partner'**

*De facto partners*

- (1) *For the purposes of this Act, a person is the de facto partner of another person (whether*

*of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.*

*De facto relationship*

- (2) *For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:*
- (a) they have a mutual commitment to a shared life to the exclusion of all others; and*
  - (b) the relationship between them is genuine and continuing; and*
  - (c) they:*
    - (i) live together; or*
    - (ii) do not live separately and apart on a permanent basis; and*
  - (e) they are not related by family (see subsection (4)).*
- 1...]*

10. The applicant was granted the secondary visa on the basis that he was a member of the family unit of the primary visa holder as he was in a genuine and continuing relationship with Maria Juanita Barboza. Information before the delegate indicated that the applicant had ceased to be either a spouse or a de-facto partner of that person. It therefore appeared that the applicant ceased to be a member of their family unit as prescribed by reg 1.12(2)(a).
11. Based on this information, there appeared to be grounds for cancelling the applicant's visa under s 116 (1)(a) of the Act because it appeared that a circumstance which permitted the grant of the visa no longer existed.
12. On 9 January 2020 the applicant was sent a Notice of Intention to Consider Cancellation of visa. He responded in writing on 15 January 2020. He admitted that there are grounds for cancellation and provided the following reasons, as summarised by the Delegate:
  - The applicant stated that he had been separated from Maria Juanita Barboza since 9 October 2019 and in his view, the separation was temporary.
13. At the hearing, the applicant acknowledged that he is separated from his wife and informed the Tribunal that the Federal Circuit Court of Australia has made final property orders and interim parenting order on 20 February 2020. The Tribunal has read and had regard to the Orders of Her Honour Judge Boymal made on 20 February 2020.
14. On the basis of the above evidence, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

### **Consideration of discretion**

15. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
16. The applicant provided extensive reasons for why his visa should not be cancelled, as summarised by the Delegate, as follows:
  - The applicant and his wife share a child who was born on 4 January 2014.
  - The applicant and his wife have participated in extensive counselling sessions mandated by the Federal Circuit Court of Australia as part of the property and child custody negotiations between the applicant and his wife.
  - Reports have been prepared and filed in the Court pertaining the welfare of the minor child and the applicant's visitation rights with his child.
  - The applicant gave candid evidence that there is an intervention order in place as between he and his wife and child, which he consented to without admission and that this has been taken into account and has not impeded upon the his right to visitation with his child.
  - The parenting orders clearly disclose the dates, times and places that the applicant may communicate with his wife and by extension, his child.
  - The matter is yet to be finally determined, but the applicant is acutely concerned at the prospect of being separated from his daughter is his visa is cancelled, the Court orders have made provision for a family consultant to examine his daughter to ascertain her wishes for seeing her father and the applicant has informed the Tribunal that his young daughter wants to see both her father and her mother, that she is emotionally and financially dependant upon the applicant and to be separated from him would cause her unnecessary distress and possibly mental harm. The applicant described the demeanour of his daughter when he returns her to her mother on a Sunday evening, as depressed in her mood.
  - The applicant is a Roman Catholic who took vows in Church and on that basis, feels strongly about providing for his family.
17. Purpose of applicant's travel to and stay in Australia
18. The applicant was granted a Student (TU 500) visa as a dependent (spouse) for the purpose of being able to accompany and remain in Australia temporarily with the primary visa holder Maria Juanita Barboza with whom he was married.
19. The Department was notified that the visa holder ceased to be the spouse of Maria Juanita Barboza, which the applicant admitted in his evidence.
20. As the applicant has ceased to be the spouse of the primary visa holder, the Tribunal considers that the purpose for which the visa was granted has ended and there is no legitimate immigration reason for the applicant to continue to hold the dependant student visa.
21. The Tribunal affords this consideration some weight in favour of cancelling the visa.

22. The extent of compliance with visa conditions

23. There is no evidence before the Tribunal to suggest that the applicant has breached any of his visa conditions. The Tribunal gives this consideration a little weight against cancelling the applicant's visa.

24. The degree of hardship that may be caused to the visa holder and any family members

25. The Tribunal refer to the applicant's evidence as set out above and particularly, the content of the Federal Circuit Court of Australia's Orders as to the nature of the custody arrangement between the applicant and his wife regarding shared care of their minor daughter.
26. The Tribunal places significant weight on the applicant's evidence that it will cause not only him, but his minor child significant emotional distress and therefore hardship, if the applicant's visa is cancelled. The hardship arises because will have to return to his home country and will be unable to see his child, as the applicant's wife will remain in Australia, with the child and continue to be a student.
27. Given the clear evidence that a minor family member in Australia will be adversely affected by the cancellation of the applicant's visa, the Tribunal gives this consideration significant weight against cancelling the visa.

28. The circumstances in which the ground for cancellation arose

29. The grounds for cancellation arose when the applicant ceased to be the spouse of the primary visa holder Maria Juanita Barboza.
30. The Tribunal notes that there is no evidence before it of extenuating circumstances that caused the breakdown of his relationship with his wife, that were beyond the applicant's control.
31. However, given the potential for serious emotional distress being inflicted upon a minor child if the applicant's visa is cancelled, the Tribunal affords this consideration only minor weight in favour of cancelling the visa holder's.

32. The visa holder's past and present behaviour towards the Department

33. The applicant responded promptly to the NOICC and there is no evidence before the Tribunal to suggest that the applicant has been uncooperative with the Department or departmental staff.
34. The Tribunal gives this consideration a weight against cancelling the visa.

35. Whether there are any persons in Australia whose visas would, or may, be cancelled under s140

36. The circumstances of this case are not such that any person's visa would be consequentially cancelled under s140 of the Act. The Tribunal therefore does not give this factor any weight for or against a decision to cancel the visa for this consideration.

37. Legal consequences of a decision to cancel the visa

38. If the visa is cancelled, the applicant will become an unlawful non-citizen and may be liable for detention under section 189 and removal under section 198 of the Act if she does not

voluntarily depart Australia. The applicant would also be affected by section 48 of the Act, which may prevent her from applying for certain visas while in Australia, and Public Interest Criterion 4013, which may exclude her from being granted a visa for a specific period of time in the future.

39. These are mandatory and intended consequences of the legislation. However, the Tribunal considers that these consequences would have an adverse effect upon the mental and emotional well being of the applicant's minor child, as she would be prevented from seeing her father for an extended period of time, possibly years.

40. The Tribunal gives this consideration significant weight against cancelling the visa.

41. Australia's international obligations

42. The clear evidence before the Tribunal, evidenced by way of Orders of the Federal Circuit Court of Australia as set out above, establish that the applicant has a minor child in Australia who the Court has made parenting orders in respect of.

43. Therefore, while the Tribunal does not consider that cancelling the visa would necessarily lead to a breach of Australia's non-refoulement obligations, the Tribunal is persuaded that the child would be mentally and emotionally adversely effected by any separation from her father.

44. The Tribunal give this some weight against cancelling the visa for this consideration.

45. Any other relevant matters

46. The matters set out above do not reveal any bad faith on the part of the applicant and while the reason for the visa breach is not necessarily due to a matter beyond the control of the applicant, the emotional and mental welfare of a minor child who would be adversely affected by a separation from her father is the clear and overwhelming reason why the Tribunal finds it is appropriate not to cancel the applicant's visa in this case.

47. It is also clear that the considerations I have arrived at, on examining and weighing all the evidence before me, lean towards the visa not being cancelled and I so find.

48. Considering the circumstances as a whole, the Tribunal concludes that the visa should not be cancelled.

**DECISION**

49. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 500 (Student) visa.

Vanessa Plain  
Member